Sheet Metal Workers' International Association, Local 28, AFL–CIO *and* Hausman Engineering and International Union of Operating Engineers, Local 295, AFL–CIO and The Shorestein Company. Case 2–CD–882

April 10, 1995

DECISION AND ORDER QUASHING NOTICE OF HEARING

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

The charge in this Section 10(k) proceeding was filed on May 16, 1994, by Hausman Engineering alleging that the Respondent, Sheet Metal Workers' International Association, Local 28, AFL–CIO (Sheet Metal Workers Local 28), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing The Shorestein Company to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 295, AFL–CIO (Operating Engineers Local 295). A hearing was held on June 14, 1994, before Hearing Officer Geoffrey Dunham. Thereafter, Hausman and Sheet Metal Workers Local 28 each filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Charging Party, Hausman Engineering, a New York proprietorship with a place of business at 2 Penn Plaza, Suite 1500, New York, New York, is engaged in the replacement, maintenance, and repair of control dampers for air conditioning units. Annually, in the course and conduct of its business, Hausman receives gross revenues in excess of $500,000 and purchases and receives goods, products, and supplies valued in excess of $50,000 from points located outside the State of New York.

The Shorestein Company, a proprietorship with an office and place of business at 200 Park Avenue, New York, New York, provides management services to owners of commercial buildings. Annually, in the course and conduct of its business, Shorestein receives gross revenues in excess of $500,000 and purchases and receives goods, materials, and services valued in excess of $50,000 from points outside the State of New York.

We find that Hausman and Shorestein are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Additionally, the parties stipulated and we find that Sheet Metal Workers Local 28 and Operating Engineers Local 295 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Shorestein is the general contractor for the removal and replacement of approximately 268 control dampers, which control air flow from air conditioning fans, at 200 Park Avenue in New York City. In April 1994, Shorestein solicited bids for the work and received bids from four contractors, including Hausman.[1] All the contractors except Hausman have collective-bargaining agreements with Sheet Metal Workers Local 28. Hausman has a collective-bargaining agreement with Operating Engineers Local 295.

In May, after Shorestein received the bids, Andrucki, a business agent for Sheet Metal Workers Local 28, told Shorestein representatives Patrick and Cotilla that the damper replacement work at 200 Park Avenue was within Local 28's jurisdiction, and that if Shorestein assigned the work to Operating Engineers Local 295, Local 28 would engage in informational picketing in front of the building.

As of the time of the hearing, Shorestein had not assigned the work and Local 28 had not picketed. Gorndt, Shorestein's building manager at 200 Park Avenue, appeared for Shorestein at the hearing and stated that because of the dispute, Shorestein decided ''[to] purchase the materials directly and . . . have [the dampers] installed by in house staff.'' In this regard, Patrick, Shorestein's chief engineer, testified that in the past Shorestein has performed damper repair work in-house with employees who are represented by Operating Engineers Local 94, which is not a party to this proceeding. According to Patrick, Shorestein has had a bargaining relationship with Local 94 for about 5 years. When questioned by the hearing officer as to whether Shorestein has collective-bargaining agreements with any other unions, Patrick cited Cleaning Personnel Local 32B, Plumbers Local 2, and Electrical Workers Local 3, but did not include either of the Unions that are parties here.

B. *Work in Dispute*

The disputed work is the removal and installation of control dampers at 200 Park Avenue in New York City.

C. *Contentions of the Parties*

Hausman contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated because Sheet Metal Workers Local 28 ''claims the work

[1] All dates are in 1994 unless otherwise indicated.

that Hausman has assigned to Local 295.'' Hausman maintains that for the past 5 years it has used employees who are represented by Operating Engineers Local 295 to perform control damper replacement work and is satisfied with their performance. Hausman further contends that the control damper replacement work at 200 Park Avenue should be awarded to employees represented by Operating Engineers Local 295 based on Hausman's collective-bargaining agreement with Local 295 and its preference and past practice, as well as on the following factors: area and industry practice, relative skills, and economy and efficiency of operations.

Shorestein expressed no interest as to whether the control damper replacement work should be assigned to employees who are represented by Operating Engineers Local 295 or Sheet Metal Workers Local 28 and, as indicated above, stated its intention to perform the work in-house.

Operating Engineers Local 295 contends that the control damper replacement work is within its jurisdiction pursuant to its collective-bargaining agreement with Hausman Engineering.

Sheet Metal Workers Local 28 contends that by virtue of its constitution and contracts with multiemployer associations, employees represented by it have traditionally fabricated, installed, and renovated dampers in all areas within its territorial jurisdiction, and that its members in fact fabricated and installed the heating and air conditioning system at 200 Park Avenue. Although recognizing that Shorestein has not assigned the disputed work, Local 28 contends that the work should be awarded to employees it represents based particularly on area and industry practice, economy and efficiency, and the high level of skills possessed by Local 28 members.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k), it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary settlement of the dispute. We are not satisfied that reasonable cause exists to believe that a violation has occurred in this case.

When a general contractor has assigned disputed work to a subcontractor, the subcontractor becomes the ''employer'' for purposes of analyzing those factors relevant to a determination of a work jurisdiction dispute.[2] It is undisputed that Shorestein has not subcontracted the disputed work to any of the contractors which submitted bids. In particular, Shorestein has not subcontracted the work to Charging Party Hausman; therefore, Hausman is not the ''employer'' responsible for selecting the employees to perform the work.[3] For this reason, we reject Hausman's contention that it has already assigned the Park Avenue damper replacement work to employees represented by Operating Engineers Local 295, and we find that Hausman's contentions regarding its collective-bargaining agreement with Operating Engineers Local 295 and its preference and past practice are premature.[4]

Shorestein has expressed an intent to perform the disputed work in-house. There is no indication that Shorestein has collective-bargaining agreements with or employs any employees represented by the Unions that are parties to this proceeding. Thus, we further find that to the extent that Shorestein is the ''employer'' and has selected its own employees to replace the dampers, any competing claims for the work would involve the nonparty Unions that represent Shorestein's employees, which dispute is not the subject of the charge in this case alleging conduct that violates Section 8(b)(4)(D).[5]

Under these circumstances, we find no basis for finding a prima facie case for a violation of Section 8(b)(4)(D).[6] Absent a finding of reasonable cause to believe that Section 8(b)(4)(D) has been violated, this matter is not a jurisdictional dispute subject to resolution under Section 10(k). Accordingly, we shall quash the notice of hearing.

ORDER

It is ordered that the notice of hearing in Case 2–CD–882 is quashed.

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[2] *Carpenters Local 1207 (Carlton, Inc.)*, 313 NLRB 71, 72 fn. 6 (1993); *Bricklayers Local 5 (Oscar J. Boldt Construction)*, 312 NLRB 833, 834 (1993).

[3] We note that any future subcontracting of the work by Shorestein is not only speculative but is unlikely in view of Shorestein's stated intent to perform the work in-house.

[4] Compare *Communications Workers Local 915 (Newsday)*, 306 NLRB 874, 876–877 (1992) (where employer assigned the work to an unstaffed area of operation rather than to a specific group of employees, the Board found that the absence of the actual selection of employees to be assigned the work meant that a ''fundamental prerequisite for a jurisdictional dispute''—competing claims for the work—was lacking).

[5] *Printing & Paper Trades Workers Local 520*, 168 NLRB 531, 532 (1967) (Board declined to determine possible disputes over future work assignments as, inter alia, no charge had been filed relating to such future work).

We note that although there is no indication that the damper replacement work has begun, the Board has recognized that when an employer has made a formal and specific assignment of work to a defined group of employees, the fact that the work has not yet commenced does not constitute a bar to finding a genuine jurisdictional dispute where it is otherwise supported by reasonable cause. See *Operating Engineers Local 3 (Schnitzer Steel)*, 303 NLRB 13, 14 fn. 5 (1991); *Teamsters Local 216 (Granite Rock Co.)*, 296 NLRB 250, 250 fn. 4 (1989), enfd. mem. 940 F.2d 667 (9th Cir. 1991).

Because we find that no competing claims exist for the work at issue here, we do not reach the other arguments raised by the parties.

[6] See *Printing & Paper Trades Workers Local 520*, supra, 168 NLRB at 532.